

Recommended Intellectual Property Management to Support Open Research

The Australian situation

Our research showed that while many universities attempt to retain some intellectual property rights, there is no sector consistency in how universities go about managing ownership of publications. This makes it difficult for staff and publishers to negotiate appropriate contracts that are compliant with Australian university open access, ethics and Indigenous knowledge policies and NHMRC and ARC Open Access (OA) mandates. The failure to effectively retain rights imposes unnecessary financial burdens on university budgets. Many universities now have institutional OA Policies; however, recourse to high-cost methods of achieving open access through paying article processing charges (APCs) or 'Read and Publish' agreements is unsustainable. Our fieldwork research also showed that most Australian academics do not archive copies of publication contracts and do not understand these agreements. This makes reporting on compliance with relevant policies very difficult. Data reported by academics to their universities and public funders is unreliable.

The solution

The IP Policy clauses have been crafted to facilitate best practice open access in the Australian legal context, mindful that the specifics of the OA policy landscape are best managed in a separate policy. Our recommendations are minimum requirements to achieve sector certainty and consistency in asserting university intellectual property rights retention (RR) to facilitate open research. The prior university claim to IP or 'carve out' of rights would override inconsistent contracts signed by authors. Adoption of these clauses will reduce compliance and administrative costs, as the university will have confidence in its retention of rights to research publications without the need to consult academics about the terms of licence arrangements agreed to by publishers. There would be less need for the sector to negotiate with publishers over licences for research assessment and other subsidiary uses of publications. Researchers would be freed from responsibility to negotiate copyright terms designed to protect their employer's commercial interest.

We have not included clauses relating to management of rights to student intellectual property, commercialization or management of patent rights.

Summary of Key Recommendations

1. The University as an employer owns all intellectual property (IP) created by senior staff, academic and professional staff members in the course of their employment.
2. The University does not assert any right or claim to ownership of the IP in Creative Works created or composed by its Staff or Students, except where these works have been specifically commissioned by the University. Many universities do not currently identify the different legal considerations that arise with creative works and university RR would unreasonably burden ordinary commercial exploitation of these outputs.
3. This ownership exists as a matter of law and does not require any further documentation from staff members. There is no need for 'Harvard style' addendums of university rights reservations that are ineffective.
4. The University does not, as a matter of course, assert ownership of IP created by Visitors or Visiting Fellows.
5. Universities need to more effectively assert rights over Background IP. This is particularly important due to the rise of informal collaborations between staff and external parties in

response to impact and engagement activities that may not be subject to IP Commercialisation agreements.

6. To the extent that a research project involves Indigenous co-authorship, collaboration and sharing of Indigenous Cultural and Intellectual Property (ICIP) rights, there must be a written agreement about ownership and access conditions concerning the research outputs and research data. This is in line with the Australian Code for the Responsible Conduct of Research and subsidiary policies already in force in Australian universities. In many circumstances, mainstream IP rights can be effectively used to protect ICIP. These need to be considered in addition to any university protocols.
7. The University grants each staff member a non-exclusive, royalty free, perpetual, irrevocable, world-wide transferable right to reproduce, publish, perform, communicate, adapt or modify their scholarly works. This is important to give academics the freedom to elect the best outlet for their publications and for their contracts to have the desired legal effect. Combined with the clause concerning Ownership of IP, universities can rely on their own rights without the need to consult publisher contracts and can hold copies of publications in line with OA policies in subject specific or institutional repositories.
8. The University asserts ownership over all IP in teaching material. All universities currently have a similar clause to this. It is important to minimise potential unnecessary exposure to the statutory licence for education (Copyright Agency licence fees).

Fit with Existing NHMRC and ARC OA Policies

NHMRC Open Access Policy 2022 (updated November 2023)

The proposed RR clauses will help support and strengthen the existing NHMRC OA policy and simplify compliance obligations borne by researchers and research managers. Use of the same RR terms sector-wide will avoid the problem scenarios identified by the NHRMC where publishers fail to issue compliant contracts to authors or require embargos. Once Australian universities enact the recommended RR clauses, non-compliant contractual conditions issued by the publisher become unenforceable, as the university rights take legal priority. The adoption of the recommended RR clauses will reduce compliance obligations on researchers, research managers and funders as compliance with university employment conditions will automatically ensure compliance with NHMRC rules.

The NHRMC recognises some of tensions created by OA obligations for Indigenous research and currently allows the use of a more restrictive open licence (CC BY ND) amongst other suggestions. We do not think this is necessarily an appropriate licence for Indigenous Research. These issues are discussed further in *Recommendations for Indigenous Research*.

ARC Open Access Policy 2021.1 (under Review June 2023)

The ARC Policy is due for review. The proposed RR clauses, in conjunction with an effective university OA Policy, will strengthen the existing ARC policy by removing the need to comply with publisher demands for embargos and the administrative burden on researchers to provide reasons for non-compliance with the requirement of making research openly accessible within twelve months of publication.

Notification to Publishers

There is no formal legal requirement to notify publishers of changes to Australian university approaches to rights retention and open access as new policies become effective upon date of institutional implementation. However, as past sector practice has been inconsistent and policies that already require some forms of rights retention and open access licence have been poorly communicated or not complied with, it would be prudent for a peak body such as Universities Australia to notify publishers of

the introduction of policy change across the sector. As is usual commercial practice, publishers can thereafter rely on their own inquiries. It should be noted that key professional guides such as *Clark's Publishing Agreements. A Book of Precedents* (Bloomsbury Professional, 11th edition, 2022) provides draft Gold Open Access and Creative Commons licences and already warns publishers of existing 'carve out' of exclusive rights due to university rights retention.

Model IP Clauses

The inclusions recommended below are essential minimum requirements to achieve sector certainty and consistency in managing intellectual property rights. Most university policies are already quite similar in coverage. The clauses closely draw upon existing policies with a view to requiring the most minimal alterations. **For legal effectiveness, we do not recommend any variation on the language we have used below.**

Definitions

Background IP means any IP owned by or licensed to University Staff, Student, Visitor or Visiting Fellow which they wish to use in connection with any University activities.

Staff means the officers and employees of the University, and includes academic, professional, technical and administrative officers and employees whether employed on a casual, fixed term or permanent basis, Emeritus Professors and Honorary Appointees.

Creative Works means works which are primarily artistic or creative in nature and not made for teaching purposes or to illustrate scholarly works.

Indigenous Cultural and Intellectual Property Rights means, in addition to intellectual property rights, Indigenous peoples' rights to their heritage, consisting of intangible and tangible aspects of the whole body of cultural practices, resources and knowledge systems developed, nurtured and refined by Indigenous people and passed on by them as part of expressing their cultural identity, including as reflected in Article 31 of the United Nations Declaration of the Rights of Indigenous Peoples.

Purpose

The purpose of this policy is to promote the advancement and transmission of knowledge generated by University Staff, Students, Visitors and Visiting Fellows in connection with teaching or research for the benefit of society.

Application/Scope

The policy applies to University Staff, Students and Visitors, including honorary appointments and emeritus.

Ownership of IP generated by Staff

In accordance with general law principles, the University as an employer owns all intellectual property created by senior staff, academic and professional staff members in the course of their employment. Intellectual property created in pursuance of or incidental to the performance of a staff member's employment contract is considered to have been created in the course of employment whether or not a staff member's express duties include a duty to develop intellectual property.

The University also owns intellectual property in works created by Staff that incorporate the University's Background IP, whether or not those works are created in pursuance of the Staff member's employment.

The University does not assert any right or claim to ownership of the IP in Creative Works created or composed by its Staff or Students, except where these works have been specifically commissioned by the University.

This ownership exists as a matter of law and does not require any further documentation from staff members. However, staff may be required to formally sign documents to more fully record the University's ownership of intellectual property, for example, to enable patent applications to be made.

[Carve out for Visitors:] The University does not, as a matter of course, assert ownership of IP created by Visitors or Visiting Fellows. However, where the Visitor or Visiting Fellow is working as part of a project or research activity, in particular where the activity is externally funded through the University or makes use of University Background IP or facilities and resources, then the University may require

the Visitor or Visiting Fellow to agree to an IP assignment or licence in order to become involved, or continue involvement in, the activity.

[Carve out for ICIP:] To the extent that a research project involves Indigenous collaboration and sharing of Indigenous Cultural and Intellectual Property rights, there must be an agreement that sets out the ownership of Indigenous Cultural and Intellectual Property when undertaking a research project with an Indigenous party/s.

Licence in scholarly works

The University grants each staff member a non-exclusive, royalty free, perpetual, irrevocable, world-wide transferable right to reproduce, publish, perform, communicate, adapt or modify their scholarly works.

IP ownership in educational / teaching materials

The University asserts ownership over all IP in teaching materials produced by University staff, students or title holders in the course of, or for use in, teaching at the University (for example, lecture notes and material, syllabi, handouts, study guides, course software and assessment materials) regardless of format (for example, printed, digital, electronic, multi-media presentations and web content). Excluded are personal lecture notes by staff that are not made available to students or personal notes taken by students to assist in study. In the event that the work may be considered both teaching materials and a Scholarly or Creative Work, it will be treated in this policy as teaching materials.

The University grants to the originator of the teaching materials a perpetual, personal, royalty-free, non-exclusive, non-transferable licence to use such teaching materials for teaching, educational and research purposes at other educational institutions. The originator may not use the teaching materials to compete with the University directly and may not sublicense the teaching materials to others to generate royalties, license fees or similar commercialisation returns.